

REMARKS

Claims 1-19 and 26-29 are pending in the application. This application was previously subjected to an election of species in the previous Office Action. In response to that Office Action, Applicant elected the presently pending claims and canceled claims directed to a non-elected species. The May 22, 2008 Office Action now contends that an additional election of species is necessary. Specifically, the Office Action contends that the following figures are directed to patentably distinct species:

Species I, as shown in Figure 12b, directed towards a jaw member having a rigid guide rod;

Species II, as shown in Figure 13, directed towards a jaw member having a curved guide rod extending longitudinally along the body; and

Species III, as shown in Figure 14, directed towards a jaw member having a mechanical post. [Office Action, p. 2]

Applicant acknowledges that the Office Action contends the three species are patentably distinct, and Applicant does not dispute this contention. However, when a claim on a common generic invention is allowable, and the species are related, a reasonable number of species may be claimed as well. Moreover, Manual of Patent Examining Procedure §802.01 points out that a restriction requirement is proper only if the different inventions are truly independent, which means that there is no disclosed relationship between the three species; that is, that they are unconnected in design, operation or effect. Manual of Patent Examining Procedure §803 requires that it must be demonstrated that the three species have no disclosed relationship. Only then is restriction required. The Office Action merely states that "claims to the different species recite the mutually exclusive characteristics of such species." This is not the standard for establishing the necessity of an election of species. Accordingly, Applicant respectfully submits that the Office Action has failed to show that no relationship between the species

set forth above exists, and it is the burden of the Office Action to establish with evidence of record to demonstrate that the species have no relationship.

It is further submitted that in view of the fees charged for filing of divisional patent applications and prosecution and maintaining the resulting patents, an undue burden is placed on the Applicant in light of the previous restriction requirement in this case. Thus, any restriction requirement must be clearly supported in the record.

The Office Action states that "there is an examination and search burden for these patentably distinct species due to their mutually exclusive characteristics." [Office Action, p. 2] However, the mere fact that a burden exists is not justification for restricting the present invention, particularly where an election of species has already been made in this case. Accordingly, Applicant respectfully traverses the requirement for restriction or election of species and requests that the Examiner withdraw the request and conduct an examination of the claims presently pending.

Pursuant to 37 C.F.R. §1.143, Applicant provisionally elects Species I (Fig. 12B). Applicant believes that Claims 1 – 12, 17 – 19, and 26 - 29 are each generic to all three species, and that Claims 13 – 14 are specific to Species I. Claim 15 is believed to be generic to both Species I and Species II. Applicant respectfully submits that only Claim 16 would be excluded from this provisional election. Reconsideration of the Claims are respectfully requested.

The Commissioner is authorized to charge any deficiencies or fees in connection with this amendment to Deposit Account No. 06-2425.

Respectfully submitted,
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